

FEB 28 1992

OFFICE OF THE CLERK

2  
NO. 91-994

---

**IN THE  
SUPREME COURT OF THE UNITED STATES**

---

**OCTOBER TERM, 1990**

---

**COMMONWEALTH OF PENNSYLVANIA**

*Petitioner,*

**V.**

**RENEE J. WELCH**

*Respondent,*

---

**REPLY BRIEF  
ON PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF PENNSYLVANIA**

---

**ROBERT E. COLVILLE**  
*District Attorney*

**KEMAL ALEXANDER MERIÇLI**  
*Assistant District Attorney*

**JAMES R. GILMORE**  
*Assistant District Attorney  
Counsel of Record*

**OFFICE OF THE DISTRICT ATTORNEY  
401 Allegheny County Courthouse  
Pittsburgh, PA 15219  
(412) 355-4377**

*Counsel for Petitioner*

PRINTED COPY



## TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF THE MATTER . . . . .	1
CONCLUSION . . . . .	10

## TABLE OF CITATIONS

	<u>PAGE(S)</u>
<i>California v. Freeman</i> , 488 U.S. 1311, 109 S.Ct. 854 (1989) . . . . .	4
<i>Commonwealth v. Welch</i> , 401 Pa.Super. 393, 585 A.2d 517 (1991) . . . . .	4, 8
<i>Michigan v. Long</i> , 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1202 (1983) . . . . .	5
<i>Walker v. United States</i> , 404 F.2d 900 (5th Cir. 1968) . . . . .	4
<i>Zacchini v. Scripps-Howard</i> <i>Broadcasting Co.</i> , 433 U.S. 562, 568, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) . . . . .	4

## STATEMENT OF THE MATTER

This Reply Brief is in response to the Brief in Opposition filed by respondent on the Commonwealth's Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, pursuant to Rule 15.6.

## REPLY ARGUMENT

Counsel for respondent is to be commended for her skill in the close reading of an opinion. Upon reflection and in hindsight, it cannot be denied that Superior Court made a deliberate effort to ground its decision in this case upon an independent and adequate state ground. Regretfully, the Commonwealth should have undertaken an equally specific analysis in order to have presented the case more fully in order to have anticipated this

counter-argument that valid state grounds for decision nevertheless exist. The Commonwealth regrets its failure to have realized this without the direction provided by respondent's reply. Nevertheless, when the matter is carefully considered the Commonwealth suggests that this is an excusable failing. A pertinent examination of Superior Court's opinion reveals that its effort to craft an independent and adequate state ground for the decision, in distinction to the federal constitutional violation succeeds only at the most superficial level and by necessary corollary, fails in substance.

The conception that the admission of the evidence was alternatively an abuse of discretion has no real independent significance. As an

alternative ground for reversal, separate and distinct from the alleged federal constitutional violation, it is more apparent than real. The position is fundamentally so threadbare that Superior Court's opinion, in this respect ultimately fails to maintain the fiction that it is anything other than more of the same in terms of its finding of a federal constitutional violation. Essentially, the supposed lack of probative worth of the evidence depends fundamentally upon the same concept that admission of the evidence is in derogation of respondent's Fourth Amendment constitutional protections which should be equivalent to those provided under the Fifth Amendment -- as the analogy by Superior Court to the treatment of the assertion of Fifth

Amendment privilege as discussed in *Walker v. United States*, 404 F.2d 900 (5th Cir. 1968), makes clear. *Commonwealth v. Welch*, 401 Pa.Super. 393, 585 A.2d 517, 520 (1991). Plainly this is the sole source, and sum and substance, of any cognizable prejudice in the opinion of Superior Court. In reality, Superior Court "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did . . . ." *California v. Freeman*, 488 U.S. 1311, 109 S.Ct. 854, 856 (1989) (quoting *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568, 97 S.Ct. 2849, 2854, 53 L.Ed.2d 965 (1977)). Accordingly, this Court has jurisdiction and should decide the federal issue because the state court discussion of the

evidentiary matter is "interwoven with the federal law." *Michigan v. Long*, 463 U.S. 1032, 1040, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1202 (1983).<sup>1</sup>

---

<sup>1</sup> This is a fine example of "where the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other . . ." *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164, 37 S.Ct. 318, 321, 61 L.Ed. 644 (1917), as quoted in *Michigan v. Long*, *supra*, at 1038, n. 4, 103 S.Ct. at 3475, n. 4. Without the ostensible federal constitutional violation to supply the prejudice, it just doesn't work. This Honorable Court has communicated the following precept as dispositive in such circumstances:

Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will

(continued...)

In attempting to evolve an independent and adequate state ground for its decision based upon the lack of

---

<sup>1</sup>(...continued)

accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved.

*Michigan v. Long*, *supra*, at 1040-41, 103 S.Ct. at 3476. Applicable to this case, it compels a conclusion that this Honorable Court has jurisdiction to hear this case.

probative worth of the evidence in question, Superior Court faced an intractable problem. It defies common logic to consider that a refusal to consent to a request by the police to search one's home cannot serve to prove, more or less, that one feared that the police if permitted to make a search might discover incriminating evidence. Although subject to an evaluation of its weight in any particular case, it cannot be reasonably offered that such a refusal could have no conceivable bearing on an individual's desire to prevent the police from finding incriminating evidence that might be located in the home. Thus, Superior Court faced a dilemma. The

Commonwealth suggests that Superior Court ultimately failed to solve this problem in a manner that affords solace to respondent's position. Superior Court essentially was compelled by its reasoning to return to the concept that the evidence should be inadmissible because to admit it would denigrate the exercise of respondent's federal constitutional rights under the Fourth Amendment, drawing an analogy to the prohibition against admission of evidence commenting on one's exercise of the Fifth Amendment. There is nothing independent in the substance of this argument.

*Welch, supra*, at \_\_\_, 585 A.2d at 520. In the end it relates back to the concept that the admission of the evidence violates the Fourth Amendment. This is where the ostensible prejudice justifying

reversible error is mooted. It is nothing more than an example of tautological reasoning. Furthermore, this Court is not constrained to take such things at their asserted face value but may go to the heart of matters. The Commonwealth submits that doing so in this case yields the conclusion that the only rationale Superior Court actually has for its rule in this case is that the Fourth Amendment to the United States Constitution was violated. Therefore, this Court has jurisdiction to decide the federal issue.

CONCLUSION

WHEREFORE, the Commonwealth respectfully requests this Court grant the petition for writ of certiorari.

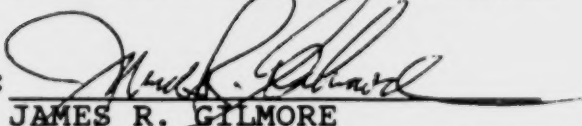
Respectfully submitted,

ROBERT E. COLVILLE  
DISTRICT ATTORNEY

CLAIRE C. CAPRISTO  
DEPUTY DISTRICT ATTORNEY

KEMAL ALEXANDER MERICLI  
ASSISTANT DISTRICT ATTORNEY

By:

  
JAMES R. GILMORE  
ASSISTANT DISTRICT ATTORNEY  
PA. I.D. NO. 44170

Counsel for Petitioner